

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP930-CR

Cir. Ct. No. 2014CF1398

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARCIUS A. LEE,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Dane County:
JOHN W. MARKSON, Judge. *Affirmed.*

Before Blanchard, Kloppenburg and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Marcius Lee appeals judgments of conviction for first-degree intentional homicide while using a dangerous weapon, armed robbery,

and being a felon in possession of a firearm, all as a repeater. Lee argues that the circuit court erred in denying his motion to sequester the victim's sister during trial. Lee also argues that he was unfairly surprised by the testimony of the victim's sister. We reject Lee's arguments and affirm.

BACKGROUND

¶2 We keep the background facts brief, and provide additional facts as relevant in the discussion section. Lee was charged with first-degree intentional homicide after eyewitnesses saw him shoot the victim in a hotel parking lot and take several bags from the trunk of the victim's car. Lee fled the scene and was later arrested in Illinois with a bag containing almost \$40,000 in cash. Police also found a duffel bag and a backpack in Lee's hotel room. An amended information added sentence enhancers for the intentional homicide charge and also charged Lee with armed robbery and being a felon in possession of a firearm, both as a repeater. The prosecution's theory of the case was that Lee shot and robbed the victim after learning that he was carrying large amounts of cash. Lee was convicted after a jury trial. Lee appeals.

DISCUSSION

¶3 Lee makes two arguments on appeal, both relating to the testimony of the victim's sister, JR. First, Lee contends that the circuit court erred in not sequestering JR. Second, Lee contends that he was unfairly surprised when JR testified about the backpack found in Lee's hotel room. We address each argument below.

Did the Circuit Court Err in Denying Lee’s Request to Sequester JR?

¶4 Lee argues that the circuit court erred in denying his request to sequester JR. Upon request of a party, the court “shall order witnesses excluded so that they cannot hear the testimony of other witnesses.” WIS. STAT. § 906.15(1) (2015-16).¹ However, there is an exception for victims. *See* WIS. STAT. § 906.15(2)(d). A family member of a deceased victim is included in the definition of victim. *See Id.*; WIS. STAT. § 950.02(4)(a)4.a. Lee concedes that JR is the sister of the deceased victim and therefore also a victim subject to the exception. However, Lee points out that the exception does not apply if “the judge ... finds that exclusion of the victim is necessary to provide a fair trial for the defendant.” WIS. STAT. § 906.15(2)(d). Lee argues that the circuit court erred in determining that excluding JR was not necessary to a fair trial.

¶5 “Sequestration of witnesses is within the discretion of the [circuit] court.” *State v. Evans*, 2000 WI App 178, ¶7, 238 Wis. 2d 411, 617 N.W.2d 220. We will conclude that a circuit court erroneously exercised its discretion if “the record shows that the [circuit] court failed to exercise its discretion, the facts fail to support the [circuit] court’s decision, or this court finds that the [circuit] court applied the wrong legal standard.” *State v. Black*, 2001 WI 31, ¶9, 242 Wis. 2d 126, 624 N.W.2d 363 (quoted source omitted).

¶6 Lee objected to JR’s presence on the ground that her testimony would be affected by her listening to the other witnesses. *See Nyberg v. State*, 75 Wis. 2d 400, 409, 249 N.W.2d 524 (1977) (sequestration “prevent[s] the shaping

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

of testimony by one witness to match that given by other witnesses”), *overruled on other grounds by State v. Ferron*, 219 Wis. 2d 481, 579 N.W.2d 654 (1998). Lee further argues that JR’s testimony was in fact shaped by what she heard. The problem with this argument is that we are reviewing whether the circuit court properly exercised its discretion based on the facts that were available at the time of its sequestration ruling.

¶7 The relevant statute provides that “[t]he presence of a victim during the testimony of other witnesses may not by itself be a basis for finding that exclusion of the victim is necessary to provide a fair trial for the defendant.” WIS. STAT. § 906.15(2)(d). Here, the circuit court noted that JR was not “an integral part of the actual occurrence,” such as an eyewitness to the shooting. The court further noted that JR would be subject to cross-examination if she deviated from her prior statements. The court concluded that, although the arrangement would not be perfect, JR had a right to be present and her sequestration was not necessary to provide Lee with a fair trial. Regardless of what actually happened at trial, the circuit court did not erroneously exercise its discretion based on the facts that were available at the time of its sequestration ruling.

Was Lee Unfairly Surprised by the Evidence About the Backpack Found in Lee’s Possession?

¶8 Lee’s second argument pertains to JR’s testimony about the bags found in Lee’s hotel room. Specifically, police found a duffel bag and a backpack, and these two bags were introduced as exhibits at trial. Lee argues that these bags were important physical evidence connecting him to the crime. Several eyewitnesses to the shooting testified that they observed a person resembling Lee shoot the victim and then take bags from the trunk of the victim’s car. Additional

witnesses testified about bags they saw in Lee's possession in the days after the shooting and before his arrest.

¶9 However, Lee contends that the State would have been unable to connect the duffel bag and the backpack to the victim without JR's testimony. This is because DNA tests on the duffel bag were inconclusive, and the victim was excluded as a DNA contributor for the backpack. In addition, Lee's girlfriend testified that Lee had taken the duffel bag from her.

¶10 Lee was aware that JR planned to testify that the duffel bag belonged to her mother and that JR had seen the duffel bag in the victim's possession prior to the shooting. However, Lee contends that he was surprised when JR testified that she also recognized the backpack. Specifically, JR testified that she had purchased two identical backpacks for her son several years earlier, and that the victim may have borrowed one of them. During the trial, JR asked her husband to text photographs of her son's backpack. The State then moved the photographs of the son's backpack into evidence, over Lee's objection.

¶11 In making evidentiary rulings, the circuit court has broad discretion. *State v. Oberlander*, 149 Wis. 2d 132, 140, 438 N.W.2d 580 (1989). The burden is on Lee to demonstrate that the circuit court erred. See *Seltrecht v. Bremer*, 214 Wis. 2d 110, 125, 571 N.W.2d 686 (Ct. App. 1997).

¶12 Lee argues that JR's evidence relating to the backpack should have been excluded as an "unfair surprise." At the outset, we note that Lee has not pointed to any statute or other source of authority that expressly authorizes a circuit court to exclude otherwise relevant evidence based on "unfair surprise." Instead, Lee points to the State's duty to disclose evidence under WIS. STAT. § 971.23(1). However, this argument goes nowhere because Lee concedes that the

State complied with its discovery obligation when it produced the newly-taken photographs during trial, shortly before JR testified.

¶13 Lee also points to *Lease America Corp. v. Insurance Co. of North America*, 88 Wis. 2d 395, 276 N.W.2d 767 (1979), in which our supreme court explained that “testimony which results in surprise may be excluded if the surprise would require a continuance causing undue delay or if surprise is coupled with the danger of prejudice and confusion of issues.” *Id.* at 400. In *Lease America*, the circuit court ordered a new trial based on its determination that it had erroneously exercised its discretion in admitting evidence that “entirely changed the climate of the trial.” *Id.* at 401. Our supreme court affirmed the circuit court’s decision, explaining that “[i]t is permissible for a [circuit] court to grant a new trial on what it retrospectively decides was its erroneous exercise of discretion in admitting evidence.” *Id.* at 402.

¶14 Lee argues that the evidence relating to the backpack had a similarly dramatic effect in his case, and therefore he is entitled to a new trial. The State disputes the significance of this evidence and argues that any error in its admission was harmless. However, we need not resolve this dispute about the impact of this evidence, because *Lease America* does not help Lee establish a basis for concluding that the circuit court erred in admitting it. Specifically, the new trial in *Lease America* depended entirely on the circuit court’s determination that certain evidence should have been excluded as unfairly prejudicial under WIS. STAT.

§ 904.03.² See *Lease America*, 88 Wis. 2d at 401. The supreme court upheld this determination as a permissible exercise of the court’s discretion. *Id.* at 402 (“[I]t was well within the [circuit] court’s discretion to conclude that the prejudicial effect of the testimony outweighed its probative value and that the [circuit] court had erred in admitting the testimony.”). But the circuit court made no such determination in the present case. In short, *Lease America* does not help Lee establish that the circuit court erroneously exercised its discretion in admitting the evidence about the backpack.

¶15 Finally, Lee notes that the circuit court could have granted a continuance to allow him to investigate the backpack in the photographs. To the extent Lee is arguing that the circuit court should have done so, this argument also goes nowhere, because we see no indication that Lee requested a continuance. Accordingly, Lee has forfeited this argument. See *Townsend v. Massey*, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155 (“[T]he ‘fundamental’ forfeiture inquiry is whether a legal argument or theory was raised before the circuit court, as opposed to being raised for the first time on appeal in a way that would ‘blindside’ the circuit court.” (quoted source omitted)).

² Pursuant to WIS. STAT. § 904.03, “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Lee’s briefs to this court do not mention WIS. STAT. § 904.03, and we do not understand him to make an argument that evidence should have been excluded under this provision.

CONCLUSION

¶16 For the foregoing reasons, we affirm the judgments of conviction.

By the Court.—Judgments affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

